IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 62693-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
ISRAEL VELASQUEZ-MARQUEZ,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: March 15, 2010
	)	
	)	

Cox, J. — Israel Velasquez-Marquez appeals his conviction of first degree murder claiming that the trial court erroneously denied his motion to admit hearsay evidence and give a missing witness instruction to the jury. He also claims that prosecutorial misconduct during closing argument deprived him of a fair trial. Because Velasquez-Marquez fails to demonstrate any error, we affirm.

While working off-duty as security at Southcenter Mall, Tukwila Police Detective Karen Sotace learned that another officer was chasing six males from the scene of a shooting of someone whose name was Wayne Molio'o. As a result, Sotace arrested Israel Alacio Bobadilla and three other young men who were all Hispanic and dressed in a manner Sotace recognized as consistent with the "Suerno 13" gang. Sotace noticed blood drops on Bobadilla's pants. As Sotace spoke to Bobadilla, a man approached her and said that his name was Mike, that he had seen everything and that Bobadilla was the shooter. Sotace

told Mike to stand to the side while she finished with Bobadilla, but Mike left. Sotace later learned that Mike was known to other officers in the area as "Crazy Mike."

At the police station, Nora Mateo, who had been present when her cousin Molio'o was shot, identified Bobadilla as the shooter. When interviewed by detectives, Bobadilla denied shooting Molio'o, but admitted that he was present when another man who looked like him and was also named Israel shot Molio'o. Bobadilla explained that the shooting was the result of a dispute between rival gangs. He claimed that the other Israel had a mole near his right eye and came to the mall in a red car with a woman named Ashleyann in order to confront the other gang. Bobadilla went with police to Ashleyann's apartment and pointed out her red car. The police later returned to the apartment and found Israel Velasquez-Marquez fully clothed and asleep on a bed next to Ashleyann Tuilaepa. Velasquez-Marquez was wearing black gloves. Police later retrieved the gun used in the shooting from under the pillow Velasquez-Marquez had been using.

The State charged Velasquez-Marquez with first degree murder with a firearm allegation and first degree unlawful possession of a firearm. Prior to trial, Velasquez-Marquez moved to admit evidence of Mike's statement that Bobadilla was the shooter as either an excited utterance or a present sense impression. The trial court determined that Velasquez-Marquez failed to establish a proper foundation for either hearsay exception and excluded the

evidence.

Although the State originally listed Bobadilla as a witness, the prosecutor learned from Bobadilla's attorney during pre-trial proceedings that he had advised Bobadilla to invoke his Fifth Amendment rights and refuse to testify. As a result, the State did not call Bobadilla to testify at trial. The trial court denied Velasquez-Marquez's request for a missing witness instruction.

At trial, Tuilaepa testified that she drove her boyfriend Velasquez-Marquez to the mall in her red car. Tuilaepa admitted that she reported to police that when they arrived at the mall, Velasquez-Marquez got out of the car, took a gun from the trunk and put it in the front of his pants, and walked toward a bus stop. Tuilaepa also told police that Velasquez-Marquez ran back to the car with the gun in his hand, and then put the gun back in his pants and got into the car. Tuilaepa testified that she saw the gun under Velasquez-Marquez's pillow later.

The jury found Velasquez-Marquez guilty as charged and the trial court imposed a standard range sentence. Velasquez-Marquez appeals.

EVIDENCE

Velasquez-Marquez first claims that the trial court denied his right to present a defense by excluding evidence of Mike's identification of Bobadilla as the shooter. He contends that the evidence should have been admitted as an excited utterance or as a present sense impression. We disagree.

A criminal defendant has a constitutional right to present his defense with relevant evidence that is not otherwise inadmissible.[1] Nonetheless, the

[1] U.S. Const. amend. VI, XIV; State v. Mee Hui Kim, 134 Wn. App. 27, 41, 139 P.3d 354

admission or refusal of evidence is within the sound discretion of the trial court and will not be reversed in the absence of manifest abuse.[2]

Hearsay, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," is not admissible unless an exception applies.[3] Under ER 803(a)(2) an excited utterance, an exception to the hearsay rule, is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The requirement of a startling event or condition is not determined solely by reference to the event itself because the proper focus is the event's effect on the declarant.[4] Determining whether a statement qualifies as an excited utterance is a fact-specific inquiry.[5]

Although the statements at issue were made shortly after the obviously startling event of a fatal shooting of a young man, nothing in the record indicates that Mike was under any stress of excitement caused by the shooting. Detective Sotace described Mike as "pretty calm," and could not remember any other details about his tone of voice or demeanor. Under these circumstances, there was no abuse of discretion in the trial court's decision that Velasquez-Marquez had not presented a sufficient foundation for admission of the statement as an

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(2006), review denied, 159 Wn.2d 1022 (2007).

[2] State v. Stubsjoen, 48 Wn. App. 139, 147, 738 P.2d 306 (1987).

[3] ER 801(c); ER 802.

[4] State v. Chapin, 118 Wn.2d 681, 687, 826 P.2d 194 (1992) (statement made in response to question after calming down from being angry was not spontaneous and reliable utterance made while under the stress of excitement caused by occurrence of startling event).

[5] State v. Brown, 127 Wn.2d 749, 757-59, 903 P.2d 459 (1995).

excited utterance.

ER 803(a)(1) provides an exception to the hearsay rule for present sense impression, which is a statement "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." The trial court determined that Mike's statements to Detective Sotace did not qualify as a present sense impression because he made the statements twenty to thirty minutes after the shooting rather than "immediately thereafter." Velasquez-Marquez's argument based on an opinion from another state affirming a trial court's admission of evidence as a present sense impression under different facts does not persuade us that the trial court abused its discretion here.[6]

MISSING WITNESS INSTRUCTION

Velasquez-Marquez contends that the trial court violated his right to present a defense by denying his request for a missing witness instruction as to Bobadilla. We disagree.

When a party fails, without explanation, to call a witness it would naturally call if the witness's testimony would be favorable, the 'missing witness' doctrine permits an inference that the uncalled witness's testimony would have been unfavorable.[7] The doctrine does not permit the inference when (1) the witness is

[6] State v, Odom, 316 N.C. 306, 312-13, 341 S.E.2d 332 (1986) (Supreme Court of North Carolina affirming trial court admission as present sense impression statements made by witness to abduction who went to notify police immediately after abduction and gave statement to officer on the scene in ten minutes).

[7] State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991); State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968) (quoting Wright v. Safeway Stores, Inc., 7 Wn.2d 341, 346, 109 P.2d 542 (1941)).

not peculiarly available to the party failing to call the witness; (2) the witness's testimony is unimportant or cumulative; or (3) the circumstances do not establish, as a matter of reasonable probability, that the party would not knowingly fail to call the witness in question unless the witness's testimony would be damaging.[8] If a witness's absence can be explained or if "some privilege applies so that the witness's testimony is protected," a missing witness inference is not permitted.[9]

We review a trial court's refusal to give a requested instruction for abuse of discretion.[10]

The trial court denied the defense request for a missing witness instruction,[11] in part, because the circumstances indicated that the State's failure to call Bobadilla was not based on the nature of Bobadilla's testimony but on his expected invocation of his Fifth Amendment privilege. Because the State satisfactorily explained Bobadilla's absence, the trial court did not abuse its discretion in refusing to give a missing witness instruction.[12]

PROSECUTORIAL MISCONDUCT

Velasquez-Marquez argues that the prosecutor committed misconduct

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[8] Davis, 73 Wn.2d at 276-80; Blair, 117 Wn.2d at 488-90.

[9] Blair, 117 Wn.2d at 489.

[10] State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336 (1998).

[11] Velasquez-Marquez requested the following instruction:

If a party does not produce the testimony of a witness who is within the control of or peculiarly available to that party and as a matter of reasonable probability it appears naturally in the interest of the party to produce the witness, and if the party fails to satisfactorily explain why it has not called the witness, you may infer that the testimony that the witness would have given would have been unfavorable to the party, if you believe such inference is warranted under all the circumstances of the case.

Israel Alacia-Bobadilla is a witness who is within the control of or peculiarly available to the plaintiff, State of Washington.

[12] See, e.g., State v. Lopez, 29 Wn. App. 836, 841, 631 P.2d 420 (1981) (missing witness instruction not permitted where State satisfactorily explained absence of migrant farm workers).

during closing argument by expressing her opinion regarding Bobadilla's veracity and Velasquez-Marquez's guilt. We disagree.

By claiming prosecutorial misconduct, Velasquez-Marquez bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial.[13]

It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness.[14] Prejudicial error will not be found unless it is "'clear and unmistakable'" that counsel is expressing a personal opinion and not arguing an inference from the evidence.[15] Even improper remarks are not grounds for reversal if they respond to a defense argument and are not so prejudicial as to be incurable by an instruction.[16] Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed to be so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.[17]

Here, in closing argument, defense counsel argued that Bobadilla was the shooter, as originally identified by Nora Mateo, and that the "State is trying to spin this so that you can ignore Nora and just go with what amounts to circumstantial evidence." In her rebuttal argument, the prosecutor stated: "And why would the State want to charge this man instead of Mr. Bobadilla, if the

[13] State v. Korum, 157 Wn.2d 614, 650, 141 P.3d 13 (2006).
[14] State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) (citing State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)), cert. denied, 129 S. Ct. 2007 (2009).
[15] Brett, 126 Wn.2d at 175 (quoting State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)).
[16] State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).
[17] Id.

evidence pointed to Mr. Bobadilla? The evidence does not point to Mr. Bobadilla. Each and every piece points to the defendant." Velasquez-Marquez did not object during the argument but moved for a mistrial at the conclusion of the State's rebuttal based on these statements.

First, Velasquez-Marquez did not preserve his claim of error by objecting and he does not demonstrate enduring and resulting prejudice that could not have been addressed by a curative instruction.

Second, even so, the prosecutor's argument is not a clear and unmistakable statement of personal belief, as was the case in State v. Sargent.[18] There the prosecutor stated, "I believe Jerry Lee Brown. I believe him . . . ."[19] Here, the prosecutor was drawing a permissible inference from the evidence as to why the jury should believe the witnesses who testified that Velasquez-Marquez, rather than Bobadilla, was the shooter, and reject the defense theory that the State was knowingly prosecuting Velasquez-Marquez in spite of evidence that Bobadilla was the shooter. Velasquez-Marquez has not met his burden to establish prosecutorial misconduct.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

[18] 40 Wn. App. 340, 698 P.2d 598 (1985).
[19] Id. at 343 (emphasis omitted).

Lau, J.

Becker, J.